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June 13, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

**Re: Western Wireless Corp. Petition for Designation as an
Eligible Telecommunications Carrier for the Pine Ridge
Reservation in South Dakota;
Western Wireless Corp. Petition for Designation as an
Eligible Telecommunications Carrier and for Related
Waivers To Provide Universal Service To Crow
Reservation, Montana;
CC Docket No. 96-45**

Dear Ms. Salas:

On behalf of Western Wireless Corp. ("Western Wireless"), I am writing to notify you of an *ex parte* presentation today regarding the proceedings referred to above, to Susan Steiman, Associate General Counsel and Chief of the Administrative Law Division; Linda Kinney, Acting Associate General Counsel; and Andrea Kearney and Steven Rangel of the Office of General Counsel. Participants in these presentations on behalf of Western Wireless included Mark Rubin, Executive Director, Federal Affairs, Western Wireless, and Michele Farquhar and the undersigned of Hogan & Hartson L.L.P., counsel to Western Wireless.

The meeting covered matters addressed in previous Western Wireless filings in this docket, with a primary focus on the jurisdictional issues raised by the petitions and related questions of Indian law. These issues are summarized in the attached handouts.

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If you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in black ink, reading "David L. Sieradzki". The signature is written in a cursive, flowing style.

David L. Sieradzki
Counsel for Western Wireless Corp.

Enclosures

cc: Susan Steiman
Linda Kinney
Andrea Kearney
Steven Rangel

WESTERN WIRELESS' PETITION FOR DESIGNATION AS AN ETC FOR THE PINE RIDGE INDIAN RESERVATION IN SOUTH DAKOTA

Background

- The FCC recently acted to remedy the problem of limited access to telecommunications by Native American residents of U.S. tribal lands:
 - ◆ Encouraged carriers to intensify efforts to serve Native American communities.
 - ◆ Adopted new universal service subsidy mechanisms to support basic telephony on Indian reservations, including new support that will allow \$1-per-month access to universal service on tribal lands.
 - ◆ Adopted policy recognizing FCC responsibility under federal trust relationship with Indian tribes and government-to-government relationship with tribes.
- Western Wireless, a cellular provider serving primarily rural areas in western states, responded to the FCC's initiative to help improve tribal telephone service:
 - ◆ Sought FCC designation as an eligible telecommunications carrier ("ETC") to provide subsidized universal service on the Crow Reservation, Montana. (8/4/99)
 - ◆ Sought FCC designation as an ETC to provide subsidized universal service on the Pine Ridge Reservation, South Dakota. (1/19/01)
 - ◇ Signed agreement with the Oglala Sioux Tribe to provide the Tate Woglaka ("Talking Wind") universal service offering at the Pine Ridge Reservation. The agreement gives the Tribe a significant role – and meaningful benefits – for assisting in the provision of service on the Reservation.
 - ◇ Provides service (at a loss) to over 1,000 Pine Ridge Reservation residents under the Tate Woglaka Agreement for a flat \$14.99 per month, even though Western Wireless has yet to be designated as eligible for universal service support.
 - ⇒ Unfortunately, Western Wireless' Tate Woglaka customers on the Pine Ridge Reservation cannot receive \$1-per-month access to universal service until Western Wireless is designated as an ETC.

FCC Designation – Jurisdiction

- While state commissions typically designate carriers as ETCs to receive universal service support, the FCC has jurisdiction to designate carriers "not subject to the jurisdiction of a State commission" as ETCs under 47 U.S.C. § 214(e)(6).

- ◆ The FCC has already exercised its Section 214(e)(6) jurisdiction to designate as ETCs tribally owned carriers providing universal service to tribal lands.
- ◆ For other carriers, such as Western Wireless, the FCC has decided that it will first determine whether there is a lack of state jurisdiction to trigger Section 214(e)(6), and then address whether the substantive ETC criteria are met.
- South Dakota lacks jurisdiction over Western Wireless' provision of universal service on the Pine Ridge Reservation under the Tate Woglaka Service Agreement.
 - ◆ The FCC must apply a balancing test between state and tribal/federal interests to decide whether the state has jurisdiction over the Tate Woglaka offering under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and other cases.
 - ◆ Is an on-reservation activity by a non-Indian such as Western Wireless subject to state or tribal jurisdiction? Under governing law, the answer depends in large part on whether the other parties to the transaction are Indian or non-Indian.
 - ◇ The vast majority (over 90%) of residents of the Pine Ridge Reservation (and of Western Wireless' existing and prospective customers) are Indians (although Western Wireless, as an ETC, would have to serve all residents that request service).
 - ◇ Western Wireless provides the Tate Woglaka offering under agreement with the Oglala Sioux Tribe, which derives substantial benefits from the offering, including financial proceeds, training, and employment preferences.
 - ◇ The vast majority of Reservation land is either owned by, or held by the federal government in trust for, the Tribe and its members.
 - ◇ The Tate Woglaka Offering is governed by the Tribe's legal jurisdiction and regulatory authority.
 - ◇ The Oglala Sioux Tribe has not consented to state jurisdiction. The South Dakota Supreme Court has ruled that the state does not have jurisdiction over Indian country, nor may it exercise partial jurisdiction over the reservation portion of infrastructure that merely passes through tribal lands (*South Dakota v. Spotted Horse*, 462 N.W.2d 463, 467 (S.D. 1990)).
 - ◇ Because Western Wireless is a commercial mobile service provider, the state is barred under 47 U.S.C. § 332(c)(3) from exercising rate and entry authority which, though not eliminating South Dakota's jurisdiction, minimizes its regulatory interest in the Tate Woglaka Offering.

FCC Designation – Other Issues

- Designating a non-tribally owned carrier on an Indian reservation is not unduly complex nor outside the realm of typical FCC decision-making – there are well-developed legal principles that the FCC can readily apply.

- The *Twelfth Report and Order*'s prohibition on carriers seeking ETC designation for tribal lands from both the FCC and the state does not bar the Pine Ridge Petition.
 - ◆ Western Wireless' Tate Woglaka offering on the Pine Ridge Reservation is jurisdictionally distinct from its universal service offerings elsewhere in South Dakota, for which it sought ETC designation by the state commission.
 - ◆ Many of the factors identified above apply here as well (*e.g.*, the agreement with the Tribe to provide service under tribal jurisdiction).
- The FCC has already found that Western Wireless' use of its cellular infrastructure to provide the services and functionalities that make up "universal service" satisfy the statutory and regulatory criteria.
- Designation of Western Wireless as an ETC on the Pine Ridge Reservation would advance the public interest.
 - ◆ The Oglala Sioux Tribal Council, on behalf of the members of the Tribe that make up the overwhelming majority of the Pine Ridge population, has already signaled its support of the Tate Woglaka Offering.
 - ◆ Over 1,000 customers, over 42% of whom previously lacked telephone service, have signed up for the Tate Woglaka Offering in the few months since Western Wireless began providing the service.
 - ◆ The Tate Woglaka Offering is improving the low telephone penetration on the Pine Ridge Reservation.
 - ◆ The Tate Woglaka Offering brings to the Reservation an expanded calling area and competition among providers of universal service, which in turn brings lower prices, improved customer service, and incentives for telecommunications providers to pursue technological advances.
- The FCC can designate Western Wireless as an ETC for just the Pine Ridge Reservation, even though the Reservation borders bisect the study areas of the incumbent rural telephone companies.
 - ◆ Just as each state has designated ILECs whose study areas cross state lines for only that portion of the study area within each state's borders, so the FCC can designate Western Wireless within the boundaries of the Reservation.
 - ◆ If necessary, the FCC could use Section 10 to forbear from applying the Section 214(e)(5) requirement that Western Wireless serve the whole of the rural incumbents' study areas. The statutory forbearance requirements are met: (1) the Section 214(e)(5) requirement is not necessary to ensure reasonable rates, (2) nor is it needed to protect consumers, and (3) the Tate Woglaka Offering confers significant public interest benefits and advances federal policy objectives.



NEWS

U.S. DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

FOR IMMEDIATE RELEASE

CONTACT: Nedra Darling

September 8, 2000

202-208-3710

GOVER APOLOGIZES FOR BIA's MISDEEDS

Agency's 175th Anniversary Occasion for Reflection

In a powerful and moving speech at a ceremony commemorating the Bureau of Indian Affairs' 175th anniversary, Assistant Secretary-Indian Affairs Kevin Gover today apologized for the ethnic cleansing and cultural annihilation the BIA had wrought against American Indian and Alaska Native people in years past. Speaking before an estimated audience of 300 people, most of whom were BIA employees, he observed that the event was not an occasion for celebration, but a time for reflection and contrition.

"We desperately wish that we could change this history," Gover said, "but of course we cannot. On behalf of the Bureau of Indian Affairs, I extend this formal apology to Indian people for the historical conduct of this agency."

Gover pointed out that the agency's lengthy cultural assault on American Indians and Alaska Natives for most of its history, particularly on the children sent to BIA boarding schools and their parents, has yielded a trauma of shame, fear, and anger that has passed from generation to generation fueling the alcohol and drug abuse and domestic violence that continues to plague Indian country. "These wrongs," he said, "must be acknowledged if the healing is to begin."

Gover noted a healing process is crucial to letting go of the past and laying the groundwork for the future. "The Bureau of Indian Affairs was born in 1824 in a time of war on Indian people," he said. "May it live in the year 2000 and beyond as an instrument of their prosperity."

Gover also presided at a ceremony dedicating the Assistant Secretary-Indian Affairs' corridor in the Department's headquarters as the "Hall of Tribal Nations" where tribal flags from across the country will be on permanent display.

Note to Editors: *The full text of Assistant Secretary Gover's speech is on the BIA's web site.*



Remarks of
Kevin Gover, Assistant Secretary-Indian Affairs
Department of the Interior
at the
Ceremony Acknowledging the 175th Anniversary
of the Establishment of the
Bureau of Indian Affairs
September 8, 2000



In March of 1824, President James Monroe established the Office of Indian Affairs in the Department of War. Its mission was to conduct the nation's business with regard to Indian affairs. We have come together today to mark the first 175 years of the institution now known as the Bureau of Indian Affairs.

It is appropriate that we do so in the first year of a new century and a new millennium, a time when our leaders are reflecting on what lies ahead and preparing for those challenges. Before looking ahead, though, this institution must first look back and reflect on what it has wrought and, by doing so, come to know that this is no occasion for celebration; rather it is time for reflection and contemplation, a time for sorrowful truths to be spoken, a time for contrition.

We must first reconcile ourselves to the fact that the works of this agency have at various times profoundly harmed the communities it was meant to serve. From the very beginning, the Office of Indian Affairs was an instrument by which the United States enforced its ambition against the Indian nations and Indian people who stood in its path. And so, the first mission of this institution was to execute the removal of the southeastern tribal nations. By threat, deceit, and force, these great tribal nations were made to march 1,000 miles to the west, leaving thousands of their old, their young and their infirm in hasty graves along the Trail of Tears.

As the nation looked to the West for more land, this agency participated in the ethnic cleansing that befell the western tribes. War necessarily begets tragedy; the war for the West was no exception. Yet in these more enlightened times, it must be acknowledged that the deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life. This agency and the good people in it failed in the mission to prevent the devastation. And so great nations of patriot warriors fell. We will never push aside the memory of unnecessary and violent death at places such as Sand Creek, the banks of the Washita River, and Wounded Knee.

Nor did the consequences of war have to include the futile and destructive efforts to annihilate Indian cultures. After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.

This agency forbade the speaking of Indian languages, prohibited the conduct of

traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. Even in this era of self-determination, when the Bureau of Indian Affairs is at long last serving as an advocate for Indian people in an atmosphere of mutual respect, the legacy of these misdeeds haunts us. The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indian families suffer the ruin of lives by alcoholism, suicides made of shame and despair, and violent death at the hands of one another. So many of the maladies suffered today in Indian country result from the failures of this agency. Poverty, ignorance, and disease have been the product of this agency's work.

And so today I stand before you as the leader of an institution that in the past has committed acts so terrible that they infect, diminish, and destroy the lives of Indian people decades later, generations later. These things occurred despite the efforts of many good people with good hearts who sought to prevent them. These wrongs must be acknowledged if the healing is to begin.

I do not speak today for the United States. That is the province of the nation's elected leaders, and I would not presume to speak on their behalf. I am empowered, however, to speak on behalf of this agency, the Bureau of Indian Affairs, and I am quite certain that the words that follow reflect the hearts of its 10,000 employees.

Let us begin by expressing our profound sorrow for what this agency has done in the past. Just like you, when we think of these misdeeds and their tragic consequences, our hearts break and our grief is as pure and complete as yours. We desperately wish that we could change this history, but of course we cannot. On behalf of the Bureau of Indian Affairs, I extend this formal apology to Indian people for the historical conduct of this agency.

And while the BIA employees of today did not commit these wrongs, we acknowledge that the institution we serve did. We accept this inheritance, this legacy of racism and inhumanity. And by accepting this legacy, we accept also the moral responsibility of putting things right.

We therefore begin this important work anew, and make a new commitment to the people and communities that we serve, a commitment born of the dedication we share with you to the cause of renewed hope and prosperity for Indian country. Never again will this agency stand silent when hate and violence are committed against Indians. Never again will we allow policy to proceed from the assumption that Indians possess less human genius than the other races. Never again will we be complicit in the theft of Indian property. Never again will we appoint false leaders who serve purposes other than those of the tribes. Never again will we allow unflattering and stereotypical images of Indian people to deface the halls of government or lead the American people to shallow and ignorant beliefs about Indians. Never again will we attack your religions, your languages, your rituals, or any of your tribal ways. Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.

We cannot yet ask your forgiveness, not while the burdens of this agency's history weigh so heavily on tribal communities. What we do ask is that, together, we allow the healing to begin: As you return to your homes, and as you talk with your people, please tell them that time of dying is at its end. Tell your children that the time of shame and fear is over. Tell your young men and women to replace their anger with hope and love for their people. Together, we must wipe the tears of seven generations. Together, we must allow our broken hearts to mend. Together, we will face a challenging world with confidence and trust. Together, let us resolve that when our future leaders gather to discuss the history of this institution, it will be time to celebrate the rebirth of joy, freedom, and progress for the Indian Nations. The Bureau of Indian Affairs was born in 1824 in a time of war on Indian people. May it live in the year 2000 and beyond as an instrument of their prosperity.

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